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Lori Blum v. Rainer Dahl : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LORI BLUM,

Plaintiff/Appellant,

District Court No. 070914252
Appellate No. 20110116

vs.

RAINER DAHL,

Defendant/Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL JUDGMENT AND A FINAL ORDER/MINUTE ENTRY OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, THE HONORABLE ROBIN W. REESE PRESIDING

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I. MS. BLUM BROUGHT HER LAWSUIT IN GOOD FAITH.

Ms. Blum is a small, 5 foot 1 inch tall, 119 pound, 76 year old nurse. R. 162; R. 774:85. After a meeting of the homeowner's association for the condominium at which Ms. Blum resides, Mr. Dahl made vulgar and insulting comments to Ms. Blum's daughter. R. 774: 92-93; R. 774:103; R. 2, ¶¶ 7-8; R. 310, ¶¶ 7-8. When Ms. Blum approached Mr. Dahl about his vulgar and insulting comments, Mr. Dahl lunged at her, shouted at her, and spit on her. R. 774:94-95; R. 582, ¶ 5, Exhibit A; R. 2-3, ¶¶ 10-16; R. 310-311, ¶¶ 10-17. After this altercation, Ms. Blum suffered fear and severe emotional distress and was the target of harassment, discrimination, and hostility. R. 774:98-99, 114-116, 118, 121-124; R. 584, ¶¶ 18-22, Exhibit A; R. 311, 313-314, ¶¶ 19-21, 41, 48; R. 161-162, ¶¶ 11-12; R. 543-545, Exhibit E; R. 185-186, 190-192, Exhibit A; R. 276-279, ¶¶ 5-29, Exhibit A; R. 283, ¶¶ 21-25, Exhibit B.

During the course of events, Ms. Blum sought legal advice to discover if she had a case against Mr. Dahl for his actions. R. 583, ¶¶ 6-9, Exhibit A. The lawyer that she hired advised her that her case had merit and that she should proceed with an action against Mr. Dahl. R. 583, ¶ 9, Exhibit A; R. 587, Exhibit 1. Based upon this advice, Ms. Blum sued Mr. Dahl. R. 583, ¶¶ 9-10, Exhibit A; R. 3-4, ¶¶ 18-26; R. 313-314, ¶¶ 35-44. Ms. Blum's original complaint plead damages for harassment and discrimination that Ms. Blum suffered from Mr. Dahl's use of his position of authority at the head of the homeowner's association "to exert undue pressure and influence upon" Ms. Blum and her daughter. R.

4, ¶ 25. The trial court dismissed these claims for damages because Ms. Blum's original counsel, Mr. Brown pled them poorly. R. 1-5; 248-249. Ms. Blum was unaware of deficiencies in her pleadings until Mr. Dahl filed a motion for summary judgment which led to the dismissal of these damages claims. R. 566; R. 248-249.

After the ruling, Ms. Blum retained new counsel to handle the case. R. 252A-253. Immediately upon retaining new counsel, Ms. Blum motioned to postpone the trial and amend her pleadings to include the subsequent events, and add other causes of action for intentional infliction of emotional distress, defamation, and false light, to address the harassment and discrimination she suffered. However, the court denied her motion to amend. R. 253, 263; R. 314-316, ¶¶ 45-63; R. 430.

The clear weight of the evidence shows that Ms. Blum's motives in bringing this lawsuit are proper. Ms. Blum has done the best that she could to bring the right causes of action to remedy the wrongs she has suffered. Ms. Blum honestly believed that her lawsuit had merit. The facts of this case show that Ms. Blum's attempted to use of the justice system was proper and completely appropriate in her mind.

A. The trial court and Mr. Dahl have failed to meet the appropriate standard for finding that Ms. Blum lacked an honest belief in the propriety of her lawsuit.

Mr. Dahl's brief focuses on one of the three good faith elements: Ms. Blum's honest belief in the propriety of her lawsuit. The other two elements are not argued and are barely mentioned. Brief of Appellee, pp. 12–13. Mr. Dahl correctly articulates the standard for finding that a party lacks an honest belief in the propriety of her lawsuit.

More specifically, "the case law draws a distinction between inferring bad faith from a meritless case the plaintiff mistakenly yet honestly believes to have merit and a meritless case the plaintiff knows is meritless but pursues anyway." Brief of Appellee, p. 30.

Mr. Dahl cites specific findings that the trial court made in making its finding of bad faith, and he argues that these facts show that Ms. Blum knew that there was no truth to her allegations. Brief of Appellee, p. 31. Almost every finding that Mr. Dahl cites fails to regard Ms. Blum's subjective belief in the merits of her assault and battery claims, but instead regards some of her motives in bringing a lawsuit against Mr. Dahl. Brief of Appellee, p. 31; *see* Brief of Appellant, pp. 29-32, 35-37 (addressing these motives). The only finding regarding Ms. Blum's subjective belief in the merits of her claims states:

> **30.** Based upon all the evidence before the Court, there is no way Ms. Blum could have concluded she had a valid claim against Mr. Dahl, *but instead she should have known her lawsuit was without merit. Even if the argument between the parties happened just as Ms. Blum, testified, there was simply no justification for this lawsuit.*
>
> R. 758–759, at ¶ 30 (emphasis added).

The conclusion that Ms. Blum "should have known that her lawsuit was without merit" does not meet the standard under Utah law that Mr. Dahl has accurately stated in his brief. Brief of Appellee, p. 30. More specifically, the trial court's conclusion is not a finding that Ms. Blum *knew* that her lawsuit was without merit. *See Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 13, 122 P.3d 556 (concluding that a party did not bring an action in bad faith even where it would have known that its claim was without merit had

it properly investigated the relevant issues and done adequate legal research); *Cady v. Johnson*, 671 P.2d 149, 152 (Utah 1983) (concluding that a party did not bring an action in bad faith even where had they "researched [an] issue as instructed at pre-trial conference, they would have discovered they had no valid claim and they could have saved the court valuable time by avoiding trial" and thus they "were clearly pursuing a meritless claim and better preparation might well have disclosed that to them"); *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 50, 86 P.3d 712 (concluding that an incorrect interpretation of case law is inadequate to demonstrate bad faith). Thus, to find that Ms. Blum lacked an honest belief in her claim, a court must find not that Ms. Blum should have known that her claims lacked merit, but that she knew that her claims were meritless and brought them anyway.

Furthermore, the fact that the trial court concluded its finding of bad faith by stating that "*[e]ven if the argument between the parties happened just as Ms. Blum testified, there was simply no justification for this lawsuit,"* is indicative of its decision to find bad faith based on lack of merit. R. 758–759, at ¶ 30 (emphasis added).

B. The available testimony shows that Ms. Blum honestly believed in the propriety of her lawsuit.

1. The parties relied on the terms of the stipulation and the only evidence regarding Ms. Blum's honest belief in the propriety of her lawsuit is Ms. Blum's post-trial affidavit.

The court-approved stipulation ordered that a finding regarding attorney fees would be made after trial by post-trial affidavits. Despite Mr. Dahl's representation to the contrary, *see* Brief of Appellee, pp. 34–35, the correct interpretation of the court-

approved stipulation does not depend on an unrecorded in chambers meeting or phone conference, or on "[c]ounsel's recollection of the course of proceedings." *Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1359 (Utah Ct. App. 1991). Instead, the Brief of Appellant has relied upon the trial court's own words and opposing counsel's own description of the stipulation. Brief of Appellant, p. 22. In the trial court's own words:

> The thing that I want to stay away from, too, I understand that *at some point depending on the outcome*, of course, the - - whether this lawsuit was filed in bad faith or not will become critical. But again, *I would like to stay away from that during the trial.*
>
> *I'm thinking of evidence*, because I'm concerned about confusion. *If we bring in a lot of evidence during the trial about why Ms. Blum brought the lawsuit, had she been persecuted of friends of Mr. Dahl that lived in the complex and so forth, I think we're going to start getting into - - or confusing the jury with issues that aren't critical to their determination.*
>
> Maybe what we'd have to do, *if the defense prevails*, and *if they choose to argue that the lawsuit was brought in bad faith, would then be allow the parties to proffer by affidavit* - - . . . Maybe that's what we're going to have to do, but I don't want to clutter the lawsuit with that, either, just because again, it may distract the jury and may lead them to think about things that wouldn't be helpful and even helpful to the plaintiff, because I'm afraid if we start suggesting to the jury during the trial that there may have been bad faith - - if we let that issue - - *if we put it out on the table, I'm concerned that the jury may - - just the power of suggestion may*

start - - lead them to start thinking that, and if they start thinking that they may punish Ms. Blum for her position for brining [sic] the lawsuit. So that's a long way of - - I just kind of hope we stay away from that stuff. *If it becomes relevant later on, I'll let you do it with an affidavit.*"

R. 774:16–17 (emphasis added).

Counsel for Ms. Blum immediately responded: "I like the Cout's way of thinking on that, your honor." R. 774:17.

Immediately following this response, counsel for Mr. Dahl responded as follows:

I think it's very wise. *It's essentially a bifurcated trial, which was what I was going to suggest*. And I - - bifurcate, I don't envision a big long presentation of evidence *on the second phase of trial*. It's something that we could just wrap up very careful - - quickly. *If it were a few items that Mr. Ascione or I thought were relevant with respect to the bad faith issue*, they could be presented quickly, I would hope, *after a verdict*.

R. 774:17 (emphasis added).

The language used by the trial court and by Mr. Dahl indicates that: (1) there was an agreement between the parties on the terms of the stipulation as set forth by the trial court; (2) the court did not want evidence of bad faith presented at trial; (3) if Mr. Dahl prevailed and chose to pursue attorney fees, evidence of bad faith could be presented after the trial by affidavit (i.e. the "second phase of trial" R. 774:17); and (4) Mr. Dahl viewed this stipulation as creating essentially a bifurcated trial and as such agreed to present items relevant to the bad faith issue after the verdict.

Counsel for Ms. Blum relied on the terms of this stipulation. More specifically, right after trial Mr. Dahl wanted to make an argument regarding bad faith based on evidence at trial. R. 775:58. Counsel for Ms. Blum immediately responded "frankly, I had thought that we would be doing it the way that the Court suggested originally, which is to simply hand in affidavits to that effect." R. 775:58–59.

Furthermore, Mr. Dahl's reliance on the trial court's post-trial interpretation of the stipulation (e.g. language such as "additional" and "if any") to establish the correctness of the trial court's post-trial interpretation is nonsensical for two reasons. Brief of Appellee, pp. 28–29. First, because the very issue is whether the trial court's post-trial interpretation is correct, using such post-trial interpretation to prove the post-trial interpretation is a circular argument. The only logical way to determine the correct interpretation of the stipulation is the pre-trial language of the stipulation and the trial court's and counsel's expressed interpretation of this language.

Second, even if this Court uses the trial court's post-trial interpretation of the stipulation, the court's own language cited in Brief of Appellee supports Ms. Blum's argument. More specifically, after the trial, the court stated that "[w]e did talk about that at the beginning that there would be certain evidence that we wouldn't bring into the trial for fear of prejudice to the jury, but Counsel could bring that up later." Brief of Appellee, p. 29; R. 775:59. The trial court's language reinforces the fact that the pre-trial stipulation was to prevent evidence of bad faith from being presented at trial and instead would be allowed to be presented by affidavit after trial. Ms. Blum relied on the pre-trial stipulation by not presenting evidence of Ms. Blum's good faith at trial.

Given the language of the stipulation, and Mr. Dahl's own interpretation of the stipulation, it is disingenuous for Mr. Dahl to ask this Court to rely on trial testimony after he failed to submit a post-trial affidavit, to request a post-trial hearing, or to controvert in any legal way Ms. Blum's testimony regarding her good faith in bringing her lawsuit. Instead, Mr. Dahl attempted to circumvent any proper way of addressing the issue of bad faith by going directly to the jury and having them submit to the trial court an affidavit that they believed Ms. Blum should have to pay attorney fees in this matter. R. 548-550. The trial court properly excluded this affidavit from evidence. R. 622.

Removing the depositions and trial testimony from consideration in making a finding of bad faith, the facts in the trial record are legally insufficient to make a finding of bad faith. Pursuant to the court-approved stipulation, the only evidence in the record that can be considered to make a determination of bad faith is Ms. Blum's post-trial affidavit, which describes how she sued in good faith. (R. 582). Ms. Blum described how, during the course of the events, she sought legal advice to discover if she had a case against Mr. Dahl for his actions. (R. 583, ¶¶ 6–9, Exhibit A). The first attorney she spoke with advised her to find a civil attorney and file a case against Ms. Dahl. (R. 583, ¶ 6, Exhibit A). Furthermore, the civil attorney she hired advised her that her case had merit and that she should proceed with an action against Mr. Dahl. (R. 583, ¶ 9, Exhibit A). Based upon this advice, Ms. Blum sued Mr. Dahl for assault and battery based upon the shouting incident. (R. 583, ¶¶ 9–10, Exhibit A). Two years later, Ms. Blum's attorney sent her a letter from Mr. Dahl's attorney, offering to settle the case. (R. 583, ¶¶ 11–12, Exhibit A; R. 589, Exhibit 2). The settlement offer strengthened Ms. Blum's belief in her

case. (R. 583, ¶ 13, Exhibit A). Subsequently, during a deposition, Mr. Dahl admitted that he was upset while speaking with Ms. Blum, and admitted that it was possible that he spit on her some time during their interaction. (R. 583, ¶ 14, Exhibit A). This again, strengthened Ms. Blum's belief in her case. (R. 583, ¶ 14, Exhibit A).

2. Even if this Court disregards the court-approved stipulation, the evidence shows that Ms. Blum honestly believed in the propriety of her lawsuit.

The testimony of the six trial witnesses is insufficient to show that Ms. Blum lacked an honest belief in the propriety of her lawsuit. Additionally, the holding in *Gallegos* and prior and subsequent related cases support a holding that Ms. Blum brought her lawsuit in good faith. Finally, the evidence that Mr. Dahl offers to show that Ms. Blum was untruthful and thus sued in bad faith is insufficient.

i. The testimony of the six trial witnesses is insufficient to show that Ms. Blum lacked an honest belief in the propriety of her lawsuit.

Mr. Dahl argues that, because certain witnesses do not corroborate Ms. Blum's testimony regarding the altercation between Mr. Dahl and Ms. Blum during which the alleged assault and battery occurred, "Ms. Blum could not have had an honest belief in the propriety of her lawsuit because she herself knew the alleged conduct forming the basis of her claims never occurred." Brief of Appellee, p. 14. Mr. Dahl's argument fails for two reasons: (1) Four of the six trial witnesses did not witness the altercation between Mr. Dahl and Ms. Blum, precluding their testimony from being used to find bad faith,

and (2) *Wardley*, the only authority that Mr. Dahl offers to support his argument regarding the testimony of the two remaining witnesses, does not apply here.

a. Four of the six trial witnesses did not witness the altercation between Mr. Dahl and Ms. Blum, precluding their testimony from being used to find bad faith.

Mr. Dahl cites to the testimony of six witnesses who he claims witnessed the altercation between Mr. Dahl and Ms. Blum. Although Mr. Dahl is correct that Ms. Blum would have sued in bad faith had she fabricated an altercation and then brought suit against Mr. Dahl based on that fabrication, there is no evidence that this is what Ms. Blum did. Mr. Dahl's reliance on the testimony of six trial witnesses to establish his fabrication claim is misplaced and is based on an incorrect understanding and interpretation of what each witness actually testified. More specifically, four of the six witnesses did not see the altercation that gave rise to Ms. Blum's claims, but instead testified regarding an altercation between Mr. Dahl and Catherine Cleveland, Ms. Blum's daughter. Thus, testimony of the four witnesses cannot be used to show that she fabricated her claims and sued in bad faith.

The two witnesses who saw the altercation between Mr. Dahl and Ms. Blum are Ms. Wheeler and Mr. Bell. Ms. Wheeler and Mr. Bell testified that Ms. Blum approached Mr. Dahl, while Catherine Cleveland was not present, and confronted Mr. Dahl for calling her daughter a name. *See* testimony of Ms. Wheeler, R. 774:216; testimony of Mr. Bell, 774:216. Both also testified that, at some point after the altercation between Mr. Dahl and Ms. Blum that gave rise to this lawsuit, Catherine Cleveland joined the

conversation, starting a new conversation between Mr. Dahl and Catherine Cleveland. See testimony of Ms. Wheeler, R. 774:219–220; testimony of Mr. Bell, R. 774:246.

Mr. Dahl cited all of six witnesses as observing Mr. Dahl doing anything threatening or spitting on Ms. Blum. Brief of Appellee, pp. 14–18. There is a very simple reason why four of the six witnesses – Nick Falcone, Sr.; Nola Falcone; Nick Falcone, Jr.; and Jeff Wheeler – never saw such behavior from Mr. Dahl towards Ms. Blum and thus did not corroborate Ms. Blum's testimony: each of these four witnesses testified at trial that they did not witness a private altercation between Mr. Dahl and Ms. Blum.

More specifically, all of Nick Falcone, Sr.'s, testimony, including that cited by Mr. Dahl, regards only Mr. Dahl's interactions with Catherine Cleveland, Ms. Blum's daughter – not Ms. Blum herself. During the trial, Mr. Dahl and his witnesses constantly referred to Catherine Cleveland as "Ms. Blum," confusing the jury and apparently the judge as to what actually took place, and who actually witnessed the altercation between Mr. Dahl and Ms. Blum. For example, a portion of Nick Falcone, Sr.'s, testimony, including the testimony cited by Mr. Dahl in his brief, is as follows:

Q. Okay. Did you observe Mr. Dahl and Ms. Blum having a conversation with each other?

A. Yes.

Q. How would you describe the tone of that conversation?

A. I would say that Mr. Ranier was very, very calm, very professional. He tried to tell you, say, you know, "We'll resolve your problem. We'll try to resolve it, but maybe it's not a good time right now."

Q. Okay. Did you ever observed Mr. Dahl jumping at or leaping at Ms. Blum?

A. Never once.

Q. Did you ever observed [sic] Mr. Dahl waving his arms in a threatening manner towards Ms. Blum?

A. I was within inches. If he had done that, I would have seen it. He did not spit ever.

Q. Okay. Did you observe Mr. Dahl screaming or yelling at Ms. Blum?

A. Very calm. No. He did not ever say anything above just a plain normal talk.

R. 774:161–162.

On cross examination, when talking about the exact same conversation, Nick Falcone, Sr., testified as follows:

Q. All right. Thank you. Did you notice Ms. Blum having a conversation with Mr. Ranier?

A. Yes.

Q. Did you listen to the totality of that conversation, to all of the conversation?

A. All of it?

Q. Yes.

A. I was there, yes, right from the very beginning of it until the end.

Q. What was the conversation?

A. Basically the conversation was that Catherine was very upset.

Q. Well, we're not talking about Ms. - - we're not talking about Catherine at this point. We're talking about Ms. Blum, right? This is the conversation between Ms. Blum and Mr. Ranier that we're talking about, correct?

A. Right.

Q. Okay. So - -

A. Do you want me to just - -

Q. Yes. Keep on going. If that's the conversation we're talking about, yes, I want to keep - -

A. That was the conversation. [Mr. Dahl] tried to explain to her, he said, "You know, Catherine, we're going to try to take care of this" - -

Q. Well, let me stop you here because I think we may have a misunderstanding. Are you saying that Mr. Ranier was talking to Catherine or was he talking to Lori?

A. To Catherine. I *never* observed Mr. Ranier *ever* talking to Lori.

R. 774:166–167 (emphasis added).

Thus, Nick Falcone, Sr., was very clearly confused about who "Ms. Blum" was during his testimony, having constantly referred to Catherine Cleveland as "Ms. Blum," confusing the jury and apparently Mr. Dahl as well. When Nick Falcone, Sr.'s, testimony was finally clarified, he very honestly stated that he never once observed Mr. Dahl talking to Ms. Blum. This is the only reason that Nick Falcone, Sr., never observed Mr. Dahl's behavior towards Ms. Blum and instead testified on behavior that occurred in a discussion between Mr. Dahl and Catherine Cleveland. Despite how clearly Nick Falcone, Sr., finally clarified the misunderstanding, Mr. Dahl has attempted to use this testimony to contradict Ms. Blum to somehow show that she did not honestly believe in the propriety of her claim. Such an argument is nonsensical.

Also, when Mr. Dahl's second witness was asked whether she saw Ms. Blum start a conversation with Mr. Dahl, Nola Falcone responded "I didn't know the mother started a conversation with Mr. Dahl. I was so caught up with what else was going on." R. 774:181." In fact, all of Nola Falcone's testimony, including that cited by Mr. Dahl, regards only Mr. Dahl's interactions with Catherine Cleveland, Ms. Blum's daughter.

Additionally, when Mr. Dahl's third witness, Nick Falcone, Jr., was asked whether he saw Mr. Dahl have a conversation with Ms. Blum, Nick Falcone, Jr., responded "I didn't see them have a private conversation." R. 774:203. Instead, like the two previous witnesses, Nick Falcone, Jr., saw only Mr. Dahl's interaction with Catherine Cleveland.

Furthermore, when Mr. Dahl's fifth witness, Jeff Wheeler, represented that he witnessed a conversation between Ms. Blum and Mr. Dahl, Jeff Wheeler was asked whether he had "the opportunity to watch the entire conversation between Lori Blum and Ranier Dahl?" R. 774:234. Jeff Wheeler answered that "No, I did not sir." R. 774:234. When asked which part of the conversation he saw, Jeff Wheeler responded "You know, it was like the meeting had been held, the meeting was broken up. I personally was all around. You know, I was in and out of the meeting room, I was in the hallway, but no, I did not see it from when the - - you know, when the problems stared [sic]. I did not see that." R. 774:234–235. Again, like the three previous witnesses, Jeff Wheeler did not witness the altercation between Mr. Dahl and Ms. Blum that gave rise to this litigation.

Thus, the testimony of four of the six trial witnesses admitted during trial that they did not witness the altercation between Mr. Dahl and Ms. Blum that gave rise to this

lawsuit and that took place before the altercation between Mr. Dahl and Catherine Cleveland.

b. *Wardley*, the only authority that Mr. Dahl offers to support his argument regarding the testimony of the two remaining witnesses, does not apply here.

Wardley is the only authority that Mr. Dahl offers for his assertion that Ms. Blum brought her claim knowing that it had no basis in fact and thus sued in bad faith. Brief of Appellee, p. 13. Essentially, Mr. Dahl's argument is that a party knows that their claim has no basis in fact, and thus sues in bad faith, if their testimony is contradicted by a witness at trial. However, for good reason, *Wardley*, nor any other case, stands for such a broad rule.

In *Wardley Better Homes and Gardens v. Cannon,* 2002 UT 99, ¶¶ 2–5, 33, 61 P.3d 1009, the Utah Supreme Court held that a real estate brokerage firm sued in bad faith where it attempted to fraudulently secure a legal obligation and then sue to enforce it. In *Wardley*, an agent of the real estate brokerage firm fraudulently altered agreements between the real estate brokerage firm and property sellers. *Id.* at ¶¶ 2–3. The fraudulent alterations had the effect of giving the real estate brokerage firm a much longer exclusive right to list the sellers' property than the sellers had actually agreed upon. *Id.* at ¶¶ 2–3. After the property sellers entered into a listing agreement with another firm during the fraudulently altered time period, and sold their property, the original real estate brokerage firm sued to enforce the fraudulently altered listing agreements. *Id.* at ¶¶ 4–5. The agent who fraudulently altered the agreement had "knowledge of his own fraud-specifically his

knowledge that the listing agreements were intended by both parties to be for only one day," much shorter than the one year provided in the fraudulently altered agreements. *Id.* at ¶¶ 3, 9. The court imputed to the real estate brokerage firm the knowledge that its agent had of his own fraud. *Id.* at ¶ 27. Based on these facts, the court held that the real estate brokerage firm "lacked an honest belief in the propriety of bringing a suit to collect a commission under a fraudulently-obtained listing agreement." *Id.* at ¶ 29. The court also concluded that, because the agent's knowledge of his own fraud was imputed to the real estate brokerage firm, the real estate brokerage firm was "deemed to have known that its unjustified action . . . would hinder, delay, or defraud by causing [the defendant] to expend resources in its defense." *Id.* at ¶ 29.

Based on the court's own reasoning, *Wardley* stands for the much narrower rule that a party lacks an honest belief in the propriety of their lawsuit when it intentionally commits misconduct and then attempts to use the court system to defraud another party. In this case, unlike the real estate agent and brokerage firm in *Wardley*, the testimony of the two remaining witnesses does not establish that Ms. Blum has committed misconduct and then attempted to use the court system to defraud another.

For good reason, Mr. Dahl was unable to find a case that actually supports his assertion. If a witness's contradiction of a party's testimony on the merits is enough to find that the party sued or defended a lawsuit in bad faith, attorney fees would be awarded in most cases, far more than the current interpretation of the law allows. Such testimony can be and is often used to determine the merits of a case. However, to hold that such testimony is sufficient to establish lack of merit as well as bad faith, without an

additional factor such as intentional misconduct and using the court system to defraud, conflates lack of merit with bad faith. *See* subsection (ii), below.

ii. The holding in *Gallegos* and prior and subsequent related cases support holding that Ms. Blum brought her lawsuit in good faith.

Gallegos and prior and subsequent related cases stand for a very narrow rule. More specifically, a finding of untruthful testimony usually supports only a finding of lack of merit. Additionally, a finding of untruthful testimony usually only supports a finding of bad faith where the testifying party committed misconduct, then tried to use the court system to defraud another, either by profiting or avoiding liability for their wrong.

The rule originates in *Topik v. Thurber*, 739 P.2d 1101 (1987), a case this Court expressly relied on in *Gallegos.* In *Topik*, the court awarded attorney fees against an attorney defendant because his "defense was partially in bad faith *and* . . . his testimony constituted 'willful falsehoods.'" *Id.* at 1104 (emphasis added). In *Topik*, the attorney repeatedly told a bank that he would disperse funds to it, but instead intentionally sent funds to his client and then lied to the court to try and avoid liability. *Id.* at 1102–1104.

The holding in *Topik* was further explained in *Valcare v. Fitzgerald*, 961 P.2d 305 (1998). In *Valcarce*, the court explained its holding in *Topik* by clarifying that "a finding that a party has attempted to avoid liability by testifying falsely will support a decision to award attorney fees *if combined with a finding of bad faith.*" *Valcarce*, 961 P.2d at 315.

In *Valcarce*, an individual intentionally damaged a canal and then lied to the court about it in attempt to avoid liability. *Id.* at 310, 315.

This Court's holding in *Gallegos* also expressly relied on the Utah Supreme Court's holding in *Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, 61 P.3d 1009. In *Wardley*, the court found that a real estate brokerage firm sued in bad faith because it intentionally fraudulently altered a seller's listing agreement and then sued the seller to enforce the agreement. 2002 UT 99, ¶ 2–5, 33.

Additionally, in *Gallegos*, this Court held that a home builder defended a lawsuit in bad faith where the home builder intentionally built their house on someone else's property and then lied to the Court about their intent. 2008 UT App 40, ¶ 16–17, 23. The entirety of this Court's reasoning before finally making a finding of bad faith regarded the home builder's "intentional conduct" in the fact that the home builder "intentionally built their house on [someone else's] property." *Id.* at ¶ 16. In *Gallegos*, after discussing the holdings in *Topik*, *Valcarce*, *Wardley*, and *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991), this Court correctly noted that, following these cases, "[t]he Utah Supreme Court has . . . cautioned against conflating the issues of merit and bad faith." *Gallegos*, 2008 UT App 40, ¶ 22.

Finally, although this Court in *Jeschke* held that a truck driver sued a bus driver in bad faith based on purposeful misrepresentations even without a finding of intentional misconduct, it did so for good reason. *Id.* at 204. More specifically, in *Jeschke*, a bus driver caused a car accident with the truck driver, and the truck driver subsequently sued the bus driver for damages done to his truck and to himself. *Id.* at 203. The "[truck driver]

testified in his deposition that his truck had never been in any accidents . . .[,]that he gave the medical personnel who had treated him a complete medical history . . .[,] [and] that he had not been involved in any accidents other than the bus accident." *Id.* at 204. However, during discovery, the defendant bus driver discovered documents, medical records, and insurance records that conclusively showed that the truck driver lied in his deposition about each of these three things. *Id.* at 203. This Court concluded that "[the car driver's] purposeful disregard for truth and his misrepresentations of material facts evidences that he lacked an honest belief in the propriety of his activities" and that "[h]is actions also demonstrate [that] [he] intended or had knowledge that the activities in question would defraud others." *Id.* at 204.

Thus, cases where a party has been found to have sued or defended a lawsuit in bad faith based on untruthful testimony usually involve intentional misconduct on the part of the party who was held to sue or defend a lawsuit in bad faith. This is because untruthful testimony is often used to establish lack of merit. Using the same untruthful testimony to establish bad faith, without an additional factor like intentional misconduct and an attempt to use the court system to defraud someone, conflates lack of merit with bad faith. Therefore, the holdings in *Topik*, *Valcarce*, *Wardley*, and *Gallegos* actually support finding that Ms. Blum brought her lawsuit in good faith. Unlike the real estate brokerage firm in *Wardley*, the home builder in *Gallegos*, the individual in *Valcarce*, and the attorney in *Topik*, Ms. Blum has not been accused of, nor has she committed, any misconduct and then attempted to profit from that misconduct by lying to the court. Thus,

the narrow exception that allows a court to find bad faith based on untruthful testimony does not apply here.

Furthermore, the facts of this case are so factually distinguishable from *Jeschke* that the holding in that case does not support finding that Ms. Blum sued in bad faith, even if this Court holds that Ms. Blum testified untruthfully on the merits. Unlike in *Jeschke*, where there were conclusive documents that without doubt proved that the car driver had lied to the court to perpetrate a fraud, the only evidence offered to "prove" that Ms. Blum was untruthful in any respect are inferences and "he said-she said" testimony.

iii. The legal argument that Mr. Dahl offers to show that Ms. Blum was untruthful and thus sued in bad faith is deficient.

Mr. Dahl's separate legal arguments are indicative of his overall argument: Ms. Blum should be held to have sued in bad faith because her claims lacked merit. He is essentially taking elements of her claims and saying that, because the trial court did not find in her favor on those issues, she must have been lying to the court and suing Mr. Dahl in bad faith. First, Ms. Blum cannot be held to have sued in bad faith simply on the basis that her testimony is the only evidence that she suffered emotional distress as a result of the altercation between Mr. Dahl and herself. Such a holding sets a precedent whereby bad faith can be inferred anytime a party testifies regarding the merits of their claim; their testimony is the only evidence supporting their assertion of what they saw, did, or felt; and a judge holds that their case lacks merit. Under such facts, the judge is essentially finding that he or she did not find the party's testimony credible. Setting such a precedent would change an award of attorney fees from being "narrowly drawn and not

meant to be applied to all prevailing parties" to being broadly drawn and applied to far more prevailing parties than is allowed under the current application of the statute. *Still Standing Stables, LLC*, 2005 UT 46, ¶ 9.

Second, Ms. Blum cannot be held to have sued in bad faith simply on the basis of the amount of damages she requested. Mr. Dahl offers no authority, nor could Ms. Blum locate any authority, for the assertion that the amount of damages someone sues for can support a finding that the party sued in bad faith. Even if there is such authority, emotional distress is "highly subjective and volatile [in] nature," *Nguyen v. IHC Health Services, Inc.*, 2010 UT App 85, ¶ 9 fn. 2, 232 P.3d 529, and requiring a court to determine the amount of damages at which a party with such a claim will be held to have sued in bad faith is overly burdensome and nonsensical.

Third, Ms. Blum's testimony regarding whether Ms. Blum testified truthfully regarding her daughter's alleged violations of homeowner's association rules has no basis on whether Ms. Blum brought this lawsuit in bad faith.

In an attempt to lend support to his argument, Mr. Dahl incorrectly quotes Ms. Blum as conceding that the above facts support a finding of bad faith. Brief of Appellee, p. 25. More specifically, Mr. Dahl argues that Ms. Blum has conceded that the above facts "[a]t most . . . can support only a finding regarding Ms. Blum's credibility," and thus, under *Gallegos*, should support a finding of bad faith. Brief of Appellee, p. 25. The text Mr. Dahl quotes as supporting his factual argument above actually refers to a completely different set of facts that are extraneous and do not go to the merits of Ms. Blum's claims; namely, whether Ms. Blum's daughter helped her draft a letter to the

homeowner's association, whether Ms. Blum knew what medical condition her daughter allegedly had, and whether Ms. Blum acted aggressively against Mr. Dahl during their altercation. Brief of Appellant, p. 38. To set the record straight regarding this "aggressive" behavior, the trial court's finding that Ms. Blum acted aggressively towards Mr. Dahl is simply untrue and unsupported by the evidence. Of the two witnesses that actually saw the altercation between Mr. Dahl and Ms. Blum, only one witness testifies regarding anyone acting aggressively towards Mr. Dahl, and in that testimony only Ms. Blum's daughter, Catherine Cleveland, is said to have acted "aggressively" towards Mr. Dahl. *See* testimony of Ms. Becky Wheeler, R. 774:219–220. The only testimony regarding Ms. Blum's behavior is that Mr. Dahl and Ms. Blum were standing close together during the altercation. *See* testimony of Ms. Becky Wheeler, R. 774:229–230. Thus, Mr. Dahl has incorrectly used a statement about one set of facts to support his conclusion regarding a completely different set of facts.

Utah cases that have held that a party sued or defended a lawsuit in bad faith on the basis of untruthful testimony have done so because the court found that the party was untruthful regarding the merits of their claim. *See Gallegos*, 2008 UT App 40, ¶¶ 16–17, 23 (holding that a party defended a lawsuit in bad faith because they testified totally without credibility where their defense was based on their intentional conduct and the court found that their testimony regarding their intentional conduct was not credible); *Wardley*, 2002 UT 99, ¶¶ 2–5, 33 (holding that a party sued in bad faith because the party knowingly attempted to fraudulently secure a legal obligation and then sued to enforce that legal obligation); *Jeschke*, 811 P.2d at 204 (concluding that "[a car driver's]

purposeful disregard for truth and his misrepresentations *of material facts* evidences that he lacked an honest belief in the propriety of his activities") (emphasis added). A finding that Ms. Blum may have lacked credibility on extraneous facts cannot be used to hold that Ms. Blum offered untruthful testimony on the merits. Therefore, under *Topik*, *Valcarce*, *Gallegos*, and *Wardley*, Ms. Blum cannot be held to have sued in bad faith based on such imputed lack of credibility.

II. MS. BLUM FULFILLED HER DUTY TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS.

A. Ms. Blum is not required to marshal evidence regarding the trial court's holding on the court-approved stipulation.

Whether a court followed the terms of a stipulation is a question of law that is reviewed for correctness. *Lloyd v. Lloyd*, 2009 UT App 314, ¶ 6, 221 P.3d 884; also *see Zions First Nat'l Bank, N.A. v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988) ("Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness"); *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997) ("A stipulation is construed as a contract").

Here, whether the trial court incorrectly interpreted the stipulation to allow trial evidence to be used to determine whether Ms. Blum sued in bad faith is a question of law reviewed for correctness, with no presumption of correctness given to the trial court's interpretation. Because the question presented to this Court on this issue is a question of law and not a question of fact, Ms. Blum has no duty to marshal evidence that supports

the trial court's interpretation of the stipulation. *See Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1052 (Utah Ct. App. 1994) (referring to the duty to marshal as "the heavy burden" born by appellants "when challenging *factual findings*") (emphasis added).

B. Ms. Blum fulfilled her duty to marshal all the evidence regarding the trial court's finding of bad faith.

Mr. Dahl gives only two reasons why he believes that Ms. Blum has failed to marshal all the evidence: (1) that Ms. Blum was incorrect in asserting that only two witnesses observed the altercation between Mr. Dahl and Ms. Blum, and (2) that Ms. Blum did not cite to Mr. Dahl's deposition.

As already set forth in thorough detail under subsection I.B.2.i., the testimony of all six witnesses confirms Ms. Blum's assertion that only two of the six witnesses actually saw the altercation between Mr. Dahl and Ms. Blum. Thus, although the four remaining witnesses may have seen portions of an altercation between Mr. Dahl and Catherine Cleveland, these witnesses did not and cannot testify as to what occurred between Mr. Dahl and Ms. Blum.

Furthermore, Ms. Blum did not cite any of Mr. Dahl's deposition because Mr. Dahl does not once discuss anything that bears on Ms. Blum's subjective belief in the propriety of her lawsuit. In fact, Mr. Dahl does not and cannot point to any portion of Mr. Dahl's deposition that supports a finding of bad faith. Although Mr. Dahl's testimony does not completely corroborate Ms. Blum's testimony, just like the two witnesses, his testimony cannot establish that Ms. Blum sued in bad faith. Mr. Dahl is essentially asking

this court to hold that Ms. Blum sued in bad faith based on evidence that supports a finding that Ms. Blum's case lacked merit. For good reason, no Utah court has held that a challenger of a factual finding of bad faith must cite to every scrap of evidence that could disagree with the challenger's testimony regarding the merits of his or her case. Such a holding would require challengers of factual findings to marshal all evidence of lack of merit to somehow support a court's finding of bad faith. This argument is indicative of Mr. Dahl's main, unsupportable position: Ms. Blum sued in bad faith because her case lacked merit.

Ms. Blum has "present[ed], in comprehensive and fastidious order, every scrap of competent evidence" that may support the trial court's finding. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

CONCLUSION

For the aforementioned reasons, Ms. Blum respectfully asks this Court to reverse the award of attorney's fees against her by the trial court.

RESPECTFULLY SUBMITTED this 3rd day of October, 2011.

ASCIONE & ASSOCIATES

PATRICK J. ASCIONE
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that on this 31st day of October, 2011, I caused to be delivered by U.S. First Class Mail a copy of the foregoing **Reply Brief of Appellant** and an electronic courtesy copy of the same to Gregory N. Hoole, attorney for Defendant/Appellee, at the following address:

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